IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-331

VICTOR JAMES LOPEZ,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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STATEMENT

Petitioner, VICTOR JAMES LOPEZ, respectfully prays that this Court grant a writ of certiorari to the United States Court of Appeals for the Second Circuit to review that Court's order of the 22nd of June, 1978, affirming the judgment of the United States District Court for the Eastern District of New York, which convicted him of violating 18 U.S.C. §§922(b)(5) and 371 [Counts One and Four of the indictment], selling fire-

arms through a licensed dealer, but failing to record the name, age and residence of the purchaser, and conspiracy to do so, after trial before Bramwell, D.J., and a jury.

Petitioner was acquitted of Counts Two and Three of the indictment, also charging him with sales of firearms, in violation of the aforementioned Section.

OPINION BELOW

No opinion was rendered by the United States Court of Appeals for the Second Circuit.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The Court of Appeals for the Second Circuit affirmed the jugement of conviction on the 22nd day of June, 1978. (Docket #78-1123)

QUESTIONS PRESENTED

1. Whether the Courts below erred in their interpretations of Section 404(b) of the Federal Rules of Evidence, in holding that evidence of uncharged crimes allegedly

committed by the Petitioner could be introduced on the Government's direct case before any evidence was offered by the defense?

2. Whether Section 404(b) of the Federal Rules of Evidence is constitutional as applied herein?

3. Whether Petitioner received a fair trial in conformity with the Fifth Amendment of the United States Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution is involved herein, as are Rules 404(b), 403, 402, 401, 102, and 609 of the Federal Rules of Evidence, and 18 U.S.C. §§922(b)(5) and 371.

THE FACTUAL BACKGROUND

At the trial the Government was permitted to adduce evidence from one William Davis, a Service Operations Manager of the Navy Exchange at Mitchell Field, that he was a neighbor of Petitioner LOPEZ and that in August of 1976, during a conversation between LOPEZ and Davis, the former

shoed him two small handguns, which he said were "off paper".

Davis was permitted to explain that this constituted existence of a crime since "off paper" meant that the gun was not registered to the person who possessed it. LOPEZ did have a license, but not for the guns in question (TT 42-44; 52-54)*.

Davis, therefore, was permitted to testify with regard to alleged prior similar criminal or wrongful acts, namely that the Petitioner possessed two "off paper" unregistered handguns at a time prior to the commencement of the alleged conspiracy (44, 52, 53). He was able to testify further that Petitioner had these guns so they would be hard to trace in the event LOPEZ should ever be mugged and therefore should have to use them.

It should be noted that Davis also was permitted to testify extensively, over objection, with regard to federal reporting

*Numerals in parenthesis refer to page numbers of the Trial Transcipt, unless otherwise specified.

requirements for guns, as well as local requirements.

Davis was also permitted to say that the day prior to Davis' purchase of guns from one Quagliano, Petitioner had told him of the existence of a friend who acquired large quantities of "off paper" guns and that LOPEZ was wondering whether Davis would be interested therein (56-58).

It should be noted that Petitioner, in the Courts below, had raised not only the contention with respect to Rule 404(b) Fed. R. Evid., but also that there was no reason to admit this evidence on the direct case of the prosecution; that it was error to allow expert testimony concerning the federal and local gun licensing requirements; and that improper hearsay testimony was used against him.

THE RULES INVOLVED

Rule 404 of the Federal Rules of Evidence entitled "Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes" provides in part....

"(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Fed. Rules Evid. Rule 404, 28 U.S.C.A.

Rule 609, Fed. R. Evid., provides:

"Rule 609. Impeachment by Evidence of Conviction of Crime

"(a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment."

Rule 102, Fed. R. Evid., provides:

"Rule 102. Purpose and Construction. These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly

determined."

Rules 403, 402 and 401, Fed. R. Evid., provide as follows:

"Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.

Although relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

"Rule 402. All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible."

"Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

POINT I

THE COURTS BELOW ERRED IN HOLDING THAT IT WAS PROPER FOR THE GOVERNMENT TO INTRODUCE OTHER CRIMES, WRONGS OR ACTS OF THE PETITIONER, IN ITS DIRECT CASE, DESPITE THE FACT THAT NO ISSUE CONCERNING THEM HAD BEEN RAISED AND NO NECESSITY FOR SUCH INTRODUCTION WAS ESTABLISHED.

Section404(b) of the Federal Rules of Evidence categorically forbids introduction of "evidence of other crimes, wrongs, or acts . . . to prove the character of a person . . ."

Under certain limited circumstances, the Rule indicates that it is conceivably proper that such proof may be introduced to establish "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

In the case at bar, the Government introduced such evidence on its direct case without any demonstration that such evidence was essential or proper under the circumstances of this case.

Rule 404(b) of the Federal Rules of Evidence is a particularized exception to the general rule of 402 that all relevant evidence is admissible.

It must also be borne in mind that the first portion of Rule 404(b) is simply a codification of the traditional common-law position that a person is to be tried only for the crime of which he is accused and not on the basis of "bad character". (See *United States v. Harris, 331 F. 2d 185 (4th Cir. 1964); Bedsole v. State, 274 Ala. 603, 150 So. 2d 696 (1963); State v. McCorvey, 262 Minn. 361, 114 N.W. 2d 703 (1962).* For a full discussion of the history and development of the common law rule on the admissibility of evidence of other crimes, see *Stone, The Rule of Exclusion of Similar Fact Evidence: America, 51 Harv. L. Rev. 988 (1938)* [hereinafter cited as *Stone*] and *Slough & Knightly, Other Vices, Other Crimes, 41 Iowa L. Rev. 325 (1956). Slough & Knightly* is cited in the *Advisory Committee's Note to Rule 404 (b). 56 F.R.D. 183, 221 (1972).*

This position has developed strictly for policy reasons. Although a defendant's previous acts may have some probative value in determining his guilt or innocence, the

fear is that introduction of such evidence will so prejudice the jury against the accused that a fair verdict will not be possible. The jury may convict a man because he is "bad" and deserves to be punished* or they may give too much weight to the evidence and assume that because the defendant committed a crime once, he has committed one again.**

There may be circumstances where the probative value does outweigh the possible prejudice. The second sentence of Rule 404 (b) addresses itself to these situations:

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*The Eighth Circuit, relying on the rule, recently reversed the conviction of the defendant in *United States v. Bledsoe, 531 F. 2d 888 (8th Cir. 1976)*, because the trial court had admitted evidence which "told the jury in effect that the defendant was a bad man." *Id* at 891. The court held that evidence of most of the defendant's criminal record and evidence that he smoked, drank and was born out of wedlock had no bearing on whether he committed the crime charged.

** *Comment, Other Crimes Evidence at Trial: Of Balancing and Other Matter, 70 Yale L.J. 763, 763-64 (1961). See also Michelson v. United States, 335 U.S. 469, 475-76 (1948).*

"It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." This list of exceptions to the general rule against admission of previous acts follows the views of Wigmore and other.*

Two distinct approaches to the list of exceptions have developed - the inclusionary and exclusionary approaches - and recent interpretations of Rule 404(b) reflect them both. As a result, the goals of uniformity and greater certainty desired by the drafters of the Federal Rules of Evidence are frustrated.**

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*2 J. Wigmore, Evidence §306 (3d ed. 1940); *Spencer v. Texas, 385 U.S. 554, 560-61 (1967).*

** *S. Rep. No. 1277, 93d Cong. 2d Sess. 8 (1974) U.S. Code Cong. & Ad. News 7051, 7054* stated:

"[T]he [Senate Judiciary Committee" is of the view that there is a real need for a comprehensive code of evidence intended to govern the admissibility of proof in all trials before the Federal courts because of the lack of univormity and clarity in the present law of evidence on the Federal level....Rules would provide uniformity, accessibility, intelligibility and a basis for reform and growth." *See also H.R.Rep. No. 650, 93d Cong. 1st Sess. (1973) reprinted in (1974) U.S. Code Cong. & Ad News 7075 [hereinafter cited as House Report].*

Professor Julius Stone distinguishes the two approaches by the questions the judge asks in determining admissibility. With the inclusionary rule, the question is "[I]s this evidence relevant otherwise than merely through propensity?"*** Using the exclusionary rule the judge asks, "Does this evidence fall within any exception to the rule of exclusion?"****

We maintain that based upon the first part of Rule 404(b) and the traditional common-law rule that evidence of other crimes, wrongs and acts should be excluded unless there is some strong possibility that it falls within the second clause's exceptions.

It should be noted further that in *United States v. Miller, 500 F. 2d 751, (5th Cir. 1974), rev'd. on other grounds, 425 U.S. 435,* the Court of Appeals recognized that the introduction of evidence of prior offenses violated the "universal rule. . . that evidence of the commission of a wholly separate and independent

***Stone, supra, at 1005*

****Id.*

crime is not admissible as a part of the case against the defendant." *(United States v. Miller, supra, 500 F. 2d at 761; 2 C. Wright, Federal Practice and Procedure, Criminal § 410, at 123).*

While the Court in *Miller* recognized that there was certain exceptions, nevertheless the Court held that the "universal" rule has been adhered to with great constancy. Thus, the opinion states *(id. at 761, 761):*

> "That analysis, however, fails to take into account the constancy with which this Court has adhered to the view that the "universal rule" against admitting evidence of other crimes is a just and wise rule, and that the exceptions to that principle, each of which has been carved out to serve a limited prosecutorial and judicial purpose, should not be permitted to swallow the rule.* Pursuant to that

*(As Dean McCormick warned, [i]f the judges, trial and appellate, content themselves with merely determining whether the particular evidence of other crimes does or does not fit in one of the approved classes, they may lose sight of the underlying policy of protecting the accused against unfair prejudice. The policy may evaporate through the interstices of the classification. *C. McCormick, Evidence § 190, at 453 (2d ed. 1954).*

> view we have adopted a balancing approach, most recently articulated in *United States v. Goodwin, 5 Cir. 1974, 492 F. 2d 1141, 1150.*
>
> Assuming, of course, that the evidence of other crimes is clear and convincing, we must balance the actual need for that evidence in view of the contested issues and the other evidence available to the prosecution, and the strength of the evidence in proving the issue, against the danger that the jury will be inflamed by the evidence to decide that because the accused was the perpetrator of the other crimes, he probably committed the crime for which he is on trial as well. See also, *United States v. Lawrance, 5 Cir. 1973, 480 F. 2d 688,691-692 n. 6; United States v. Johnson, 5 Cir. 1972, 453 F. 2d 1195, 1199; United States v. Boyd, 5 Cir. 1971, 446 F. 2d 1267, 1270-1271.* The trial record reveals that virtually no consideration was given to any of the crucial elements in the balancing process - the government's actual need for the evidence, the probative value of the evidence, or the potential prejudice to the accused."

See also, *United States v. Baldarrama, 566 F. 2d 560 (1978).*

Proof of corpus delicti is not one of the accepted purposes for use of evidence of other crimes under the exclusionary approach. Yet, under unusual circumstances a Court might permit this. *(United States v. Woods, 484 F. 2d 127 (4th Cir. 1973).*

We must bear in mind that like any other relevant evidence, before "other crimes" under Rule 404(b) can be admitted, the probative value of the other crimes information still must be weighed by the criteria of Rule 403, which excludes unfair or confusing evidence. Rule 403 is aimed explicitly at avoiding prejudice to the defendant. Thus, if the evidence is being admitted only to demonstrate propensity to commit the crime charged, then it is clearly unfair.

In *United States v. Curtis, 520 F. 2d 1300 (1st Cir. 1975),* the Court held that the Trial Judge should "assess both the probative value of the proferred evidence . . . Fed. Rule Evid. 404(b) and the danger of unfair prejudice to the defendants, Fed. Rule Evid. 403."

The difference in emphasis and approach is illustrated by two earlier attempts at codification of a rule for treating evidence of other crimes. *Model Code of Evidence Rule 311 (1942) (emphasis supplied) stated:*

> "[E]vidence that a person committed a crime or a civil wrong on a specified occasion is inadmissible, as tending to prove that he committed a crime or civil wrong on another occasion, *if, but only if,* the evidence is relevant solely as tending to prove his disposition to commit such a crime or civil wrong or to commit crimes or civil wrongs generally."

This rule emphasizes that evidence of other crimes should be excluded when that evidence is probative only of character.

In contract, *Uniform Rules of Evidence 55 (1953)* stated:

> "[E]vidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove his disposition to commit crime or civil wrong...on another specified occasion, but...such evidence is admissible when relevant to prove some other material fact including absence of mistake or accident, motive, opportunity, intent, preparation, plan, knowledge or identity."

This rule, by highlighting the one impermissible purpose for introducing evidence of other crimes and following it with the traditional list of proper purpose, has the effect of testing the evidence to see if it falls within the list rather than checking to see if it is being used only to show a

criminal propensity. While the drafters of Rule 55 may have intended "that the specifications are only exemplary and not exclusive" (comment to Rule 55), *Slough & Knightly,* in comparing Rule 55 with Model Code Rule 311, concluded that the uniform rule hews more closely to the majority rule favoring exclusion. *Slough & Knightly, supra, at 327 n. 7.* Given a common law precedent, the list of purposes for admissibility are more likely to be viewed as rigid exceptions rather than as suggested elements to be used in the judge's analysis.

Rule 403 provides:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

520 F. 2d 1300 (1st Cir. 1975)

Id at 1303. In *Curtis* the defendant had been convicted of possession of a firearm under the definition of a destructive device in the National Firearms Act. The court

vacated the conviction, but remanded for retrial because the government had not been permitted to show that the dynamite was a destructive device under the Act.

In the case at bar, however, at the point in time where evidence of other crimes was permitted as against LOPEZ on the prosecution's direct case, there was no nned or reason to bring in these other acts or crimes, unlike *Curtis*.

In both *United States v. Jackson, 405 F. Supp. 938, (E.D.N.Y., 1975), and United States v. Dansker, 537 F. 2d 40, (3d Cir. 1976),* the Courts were careful to limit the impact of prejudicial evidence by excluding the introduction of the commission of another crime.

We must bear in mind also that we are not dealing here with a situation of attempted impeachment of a witness on the stand by proof of prior convictions, which is governed by Rule 609 of the Federal Rules of Evidence. The legislative history, however, of Rule 609 is instructive since it does deal with the introduction of other crimes. See *United States v. Jackson, supra, at 941, 942* wherein Judge Weinstein explained:

> "In its present form, Rule 609(a) codifies a trend of federal cases epitomized by *Luck v. United States, 121 U.S. App. D.C. 151, 348 F. 2d 763 (1965),* which recognized the trial courts' obligation to exercise discretion in excluding evidence of convictions. *See, e.g., United States v. Johnson, 412 F. 2d 753, 756 (1st Cir. 1969), cert. denied, 397 U.S. 944, 90 S. Ct. 959, 25 L. Ed. 2d 124 (1970); United States v. Palumbo, 401 F. 2d 270, 273 (2d Cir. 1968), cert. denied, 394 U.S. 947, 89 S. Ct. 1281, 22 L. Ed. 2d 480 (1969); Wounick v. Hysmith, 423 F. 2d 873, 875 (3d Cir. 1970); United States v. Hidreth, 387 F. 2d 328, 329, (4th Cir. 1967); United States v. Gloria, 494 F. 2d 477, 481 (5th Cir. 1974); United States v. DiVarco, 484 F. 2d 670, 677 (7th Cir.), cert. denied, 415 U.S. 916, 94 S. Ct. 1412, 39 L. Ed. 2d 470 (1973); Sears v. United States, 490 F. 2d 150, 154 (8th Cir. 1974); United States v. Villegas, 487 F. 2d 882, 883 (9th Cir. 1973); Butler v. United States, 408 F. 2d 1103 (10th Cir. 1969).* The *Luck* doctrine also served as the prototype for the early compromise proposals of the House. *See Hearings Before the Special Subcommittee on Reform of Federal Criminal Laws of the Committee on the Judiciary, House of Representatives, 93rd Cong., 1st Sess., on Proposed Rules of Evidence, Serial No. 2, pp. 29-30, 231-232 (1973).*

Application of the Rule.

> It is apparent that, in its compromise form, the Rule necessarily embodies both the policy of encouraging defendants to testify by protecting them against unfair prejudice and the policy of protecting the government's case against unfair misrepresentation of an accused's non-criminality. It is incumbent upon the courts, in administering Rule 609(a), to reconcile these competing goals to the extent possible.
>
> In order fully to effectuate the policy of encouraging defendants to testify, trial courts should rule on the admissibility of prior crimes to impeach as soon as possible after the issue has been raised."

We also ask this Court to recognize that at the time the evidence in the case at bar was introduced, that is of other crimes, there had been no testimony by the defendant, nor any indication that the jury would be hoodwinked in any manner. The purpose and construction of the Federal Rules of Evidence are set forth in Rule 102, which requires that they be administered and construed "to secure fairness".

Rule 401, of course, also requires that the evidence be "relevant".

As Judge Weinstein indicated in the *Jackson* case, *supra*, when "the risk of inaccurate fact-finding by the jury will be increased more by the reception than by the exclusion" of evidence of other crimes, the evidence should be excluded *(United States v. Jackson, supra, at 945)*.

We ask the Court to take cognizance of the fact that the collateral evidence of other crimes and acts introduced by Davis against LOPEZ was unjustified at the time and was collateral to the main issues in the case. The defendant had not testified, nor had he offered evidence up to that point. This denied him a fair trial (5th Amendment).

In *United States v. Clemons, 503 F. 2d 496 (1974)* decided by the Court of Appeals for the Eighth Circuit, a prosecution for possession of heroin and conspiracy, evidence which appeared to show and was offered to show the commission of another similar offense at a time subsequent to that for which *Clemons* was charged in the case then

before the Court and unconnected with such case, was received at the trial for the purpose of showing the defendant's state of mind or intent or knowledge and to show possible absence of mistake or accident.

Addressing the question of admissibility of such evidence, after noting the general rule excluding it by reason of its prejudicial impact the Court went on to discuss the various exceptions thereto and stated "...where there is a genuine issue as to identity, motive, intent, preconceived plan, entrapment or absence of mistake or accident evidence of other crimes may be admissible..."

Thereafter, with highly persuasive reasoning, the Court went on to set forth a series of threshold conditions stating, "Before any such evidence is admitted however it must be shown that (1) an issue upon which other crime evidence may be received is raised; (2) that the proffered evidence is relevant to that issue; (3) that the evidence is clear and convincing; and (4) that the probative worth outweighs the probable prejudicial impact."

Accordingly the last test wherein prejudicial impact is weighed against probative worth ought not to have been reached prior to a consideration of the preceding factors.

However, in the case at bar, in the course of deciding a defense motion (196-203) following the testimony of Mr. Davis addressing itself among other things to the question of admissibility of evidence of other collateral crimes or acts under the circumstances wherein such was received which could be construed by the jury as criminal, the Court stated at page 202:

> "....Now, as to your other situation as to the other crimes.
>
> Now, under Rule 404(b), other crimes, wrongs or acts or evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. And the Court took it and received that testimony in that fashion, and weighed the possible prejudice. And after having weighed the possible prejudice, it was the Court's opinion that it

would be acceptable during the course of this trial.

So your motion for a mistrial is denied. ...."

Again in the course of a subsequent renewal of the defense motion for a mistrial at the conclusion of the Government's direct case by reason of the admission of the testimony to which the earlier motion referred the Court again indicated that it had admitted the evidence pursuant to Rule 404 (b) "....and weighed the possible prejudice in connection with this particular case and felt that that was properly admissible in connection with the trial of this case...." (402-409) and accordingly denied the motion.

Clearly then, the evidence having been offered for a purpose set forth in Rule 404 (b) the Court finding such to be the purpose applied the sole test of prejudice weighed against probative worth and resolved the issue in its discretion against appellant.

But although the reasoning in *Clemons supra* was not based upon constitutional considera-

tions, it is nevertheless fundamental that the first three tests there enumerated to be considered and determined to have been met by the prosecution prior to the fourth involving the weighing of factors and the exercise of discretion, constitute the very threshold that must be attained before constitutionality can be ascribed to the admission of the evidence for the purposes therein stated and of course for the purposes for which such evidence was offered in the case at bar. The absence of the conditions precedent set forth in *Clemons, supra,* from the provisions of Rule 404(b) *supra* cannot alter the constitutional necessity for their application prior to receipt of such evidence.

In *Clemons, supra,* the rule was further stated to be "Whether an issue has been raised for purposes of receiving evidence of other crimes depends upon both the elements of the offense charged and the nature of the defense presented." Both factors are to be considered and in doing so the Court stated that it being

"incumbent upon the Government to show that the appellant possessed heroin knowingly and wilfully with intent to distribute" and that "the defense in cross-examination tried to suggest that *Clemons'* part was due to inadvertence and mistake", it further said "We will assume therefore that knowledge and intent, issues on which other crime evidence may be admitted, were properly at issue," reversing the judgment of the District Court and remanding the case for a new trial for the reasons that the "other crime evidence" admitted was not clear and convincing as required by step 3 of the tests stated therein to be necessarily applied and that *Clemons* was prejudiced by its introduction.

See United States v. Cohen, 489 F. 2d 945 (2d Cir., 1973).

In pretrial, issues which were raised, such as entrapment and the like, did not justify the introduction of this evidence at trial since Rule 12 of the Federal Rules of Criminal Procedure permit the raising of such

issues in advance of trial.

Under the circumstances, the Court applied the rule (404(b)) in an unconstitutional manner and also deprived the Petitioner of a fair trial.

POINT II

THE PETITIONER INCORPORATES BY REFERENCE THE OTHER POINTS ADVANCED IN HIS BRIEF TO THE COURT BELOW.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

IRVING ANOLIK
Attorney for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-second day of June one thousand nine hundred and seventy eight.

Present: HON. J. EDWARD LUMBARD
HON. WALTER R. MANSFIELD
Circuit Judges
HON. JAMES S. HOLDEN
District Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

78-1123

VICTOR JAMES LOPEZ,

Defendant-Appellant

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the Judgment of said District Court be and it hereby is affirmed in accordance with the Court's oral opinion in open court.

A.DANIEL FUSARO,
Clerk
by ARTHUR HELLER
Deputy Clerk